

OGC HAS REVIEWED.

MEMORANDUM FOR THE RECORD

30 July 1951

SUBJECT: Special Fee Provision for Some Research and Development Contracts

1. In some cases involving research and development, the Contract Branch has felt that it was not possible to arrive at an accurate estimated cost on which to base the contractor's Fixed Fee. Consequently, the Chief of the Branch has desired to have available for use in such contracts a clause providing for scaling down the contractor's fee where actual costs are less than the Estimated Cost.
2. This is admittedly an undesirable situation since the contractor might be tempted not to reduce his costs, in order to prevent a reduction in his fee. There is also the question of the statutory prohibition against cost-plus-a-percentage-of-cost contracting. However, it is a practical fact that, in new fields of research and development, accurate estimates of cost are sometimes impossible, and the Contracting Officer cannot tell what amount of padding may be included in the Contractor's estimate. In such cases the contractor should reasonably expect only reimbursement for his costs, plus a fee commensurate with the work done.
3. It appears that the interests of the Government and the contractor can be adequately protected in some situations by providing, in essence, for payment of a fee calculated at an agreed percentage of the actual cost, but with a ceiling on the fee. Such a provision could be included in a contract only after clearance with this office. Important factors influencing approval would be the necessity for use of such a clause and the expectation, based on reputation and experience, that the contractor would not commit abuses.
4. Based on the above considerations, a clause taken from an old OSS contract was transmitted to the Chief of Procurement by a memorandum from this office dated 14 December 1950. That clause reads as follows:

"(a) Fixed Fee. The fixed fee shall be computed at _____ percent of the actual cost incurred hereunder but in no event shall the fixed fee exceed _____ percent of the maximum allowable cost set forth in paragraph (b) of this Article."

A suitable precedent for this action was found in a decision of the Comptroller General, reported at 23 Comp. Gen. 410, holding a similar


arrangement made by the Army not to be in contravention of the prohibition against cost-plus-a-percentage-of-cost contracting. The basic point in that decision was that the ceiling established in the contract was considered by the Contracting Officer as reasonable and in the best interests of the Government. The same would have to be true in our use of such a provision.

5. In connection with work currently being done to revise the basic Research and Development contract form, and in order to be fully assured on the legal aspects involved, I discussed this matter recently with Mr. Welch in the Office of General Counsel at GAO. Mr. Welch, who specializes in contract matters, stated that the clause quoted above appears acceptable from a legal standpoint. He made a check in the GAO decision files and found that 23 Comp. Gen. 410 has not been overruled.

6. This seems to justify our proceeding as described above. However, in order not to unnecessarily raise the question of cost-plus-a-percentage-of-cost upon audit, it is deemed advisable to employ the following clause, which is a redraft of the clause quoted in paragraph 4 hereof.

"Fixed Fee. The fixed fee payable to the Contractor hereunder shall be \$ _____; provided, however, that in the event the total of the Allowable Costs actually incurred hereunder is less than the Estimated Cost specified in paragraph () above, then the fixed fee payable to the Contractor hereunder shall be limited to _____% of such total Allowable Costs actually incurred."


This clause will be furnished to the Chief of the Contract Branch for use as described in this memorandum.


Office of General Counsel

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cc: ✓ Subject
Chrono


Extra (2)

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